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Supreme Court of the United States

October Term, 1975

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND MARITIME LOCAL UNION No. 8-801,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONERS

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The opinion of the Court of Appeals *en banc* entered November 8, 1974 (Appendix A to Petition, hereafter, "Pet. App.", pp. 1a-36a) is reported at 504 F.2d 272. The opinion of the original panel entered August 10, 1973 (Pet. App., pp. 1b-16b) is reported at 483 F.2d 603. The District Court's Findings of Fact and Conclusions of Law (Pet. App. 1d-8d) are reported at 81 LRRM 2051.

JURISDICTION

The original decision of a panel of the Fifth Circuit was entered on August 10, 1973. Purusant to timely motion of Respondent Mobil, rehearing *en banc* was granted and de-

cision of the *en banc* court was entered November 8, 1974. The Petition for Certiorari was granted on October 6, 1975. (A. 330.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether under Section 14(b) of the Taft-Hartley Act and the Texas "right to work" laws a union security provision in the form of an agency shop clause may apply to seamen who work exclusively aboard oceangoing vessels which move between Texas and non-Texas ports?[1]

STATEMENT OF THE CASE

I. *The Underlying Facts*

At the time of this suit petitioner Union and respondent Employer were parties to a collective bargaining agreement, covering a unit of unlicensed seamen on Mobil's oceangoing tankers, which provided in part:

"2. UNION SECURITY

b. For the duration of the Agreement all employees hired shall, as a condition of employment, become members of the Union and/or in the alternative pay the regular union dues and initiation fees within thirty-

[1] A second question was presented in the Petition: "Whether the courts below should have withheld declaratory judgment in favor of referral to the National Labor Relations Board for the initial decision in accommodating Sections 14(b), 8(a)(3) and the Texas 'right to work' laws?" Because the Board itself has since argued that this question should be answered in the negative, and in light of the intervening discussion of the subject in *Connell Construction* v. *Plumbers Local 100*, 421 U.S. 616, we shall not argue this point.

one days from the employment date." (Pet. App. 4b.)

This is an action by Mobil for a judgment declaring that the foregoing is illegal by virtue of Texas' right to work law, which forbids such agreements. The question is whether, as the Employer contends, the Texas law governs the employment of these deep-water seamen, or whether the legality of the agency shop clause is to be determined, for some or all of the seamen, by the law of some other jurisdiction which has not forbidden the agency shop. The basic facts from which the parties have advanced their respective positions are those which show the various jurisdictions which bear upon this employment relationship.

A. *The Job Situs of the Seamen*

The company operates eight oceangoing tankers which move principally between the port of Beaumont, Texas and the port of New York City and other East Coast ports. To fix the situs of work, the pattern of ship movements was established from Mobil's logs and, also, by the testimony of John Knepper, Manager of Gulf-East Coast Operations.

For vessels on the Beaumont-East Coast regular run, the following actual times were extracted from logs and established as "typical" (A. 179-180):

Ship	*Time Period in 1972*	*Time in Port of Beaumont*
SS Mobil Arrow	May 9-June 11 (34 days)	42 hours
SS Eclipse	April 27-June 22 (56 days)	99 hours
SS Mobil Fuel	May 8 to June 7 (31 days)	14 hours

SS Mobil Gas	June 1-June 23 (23 days)	43 hours

The seaboard-to-seaboard voyage requires 4½ to 5 days, Loading and unloading in port requires 18 to 30 hours. Two trips per month per vessel is usual. At Beaumont, a vessel is with pilot about 6 hours each way. At Providence, 3½ hours with pilot is usual. (A. 118, 119, 120)

Once a month, a vessel goes to Brownsville, Texas, requiring 18 days for the round trip. Eight times yearly, a vessel travels from Boston to Puerto Rico and return. At time of trial, the *SS Mobile Lube* had not been in a Texas port for 50 days, was en route to Hawaii, and was under government charter for six months. In 1971, 15% of voyage time of these vessels was devoted to foreign voyages, according to Knepper. (A. 122, 123, 124)[2]

On the basis of this evidence the District Court found, and the majority of the Court of Appeals acknowledged, that substantially all work occurred aboard tankers, which 80% to 90% of the time were traveling on the high seas or were located in ports outside Texas. (Pet. App. 5a.)[3]

B. *The Seamen's Residence and Designated Port*

Of the 289 employees, 123, or 43%, have reported Texas as their state of residence. The other 57% have listed their

[2] In 1970-1971, Mobil sold two vessels which it had operated theretofore in foreign commerce, the *SS Kolina* and *SS Sciotic*. These voyaged primarily to European ports (A. 177-178). These vessels had likewise been covered by this labor contract.

[3] The actual arithmetic shows the vessels are present in the Port of Beaumont only 5.5% of the time. Even this figure diminishes when foreign voyages, etc., are averaged in. (Pet. App. 11b.)

residence as follows: 60—New York, 21—New Jersey, 16—Florida, 13—Louisiana, 10—Rhode Island, 36—sixteen other states (A. 63, 237). Also, Mobil maintains a shipping port designation system. Advance designation of one of three named ports by an employee determines his future travel allowances to and from his residence. These designations show: 152—Beaumont, Texas; 197—New York, N.Y.; and 30—Providence, R.I. (A. 63, 237).

C. *The Company's Administrative Structure and Its Consequences*

Mobil is a New York corporation, with top corporate offices in New York. Mobil's Marine Transportation Department is operated by its General Manager, and below him, by its Manager of U.S. Operations, all located in New York. Below this level is the Manager of Gulf-East Coast Operations (Mr. Knepper), whose office is in Beaumont, Texas and who heads up the Gulf-East Coast Operations which is now also located there. Until 1962 Gulf-East Coast Operations was also headquartered in New York but in that year it was transferred to Beaumont. Due to the transfer of this intermediate level of management and operations, it is in Texas that Mr. Knepper supervises the ships' masters, conducts personnel administration, ultimately approves hiring and firing, assigns men to ships, and administers the labor contract and the payroll. Unemployment taxes are paid to Texas alone. (R. 125; A. 55, 58, 60, 71, 73, 93).

The office which handles seamen's claims for maintenance and cure, health, accident, and like benefits is in New York

(A. 78). All the vessels are registered in ports outside Texas (A. 146).

D. *The Collective Bargaining Agreement and Its Administration*

The Union was certified as bargaining representative by the New York office of the N.L.R.B. (Def. Ex. 1). It has offices in New York and Beaumont. Checkoffs of dues are mailed by the Company to the Union's New York Office (Pet. App. 2d).

At all times since 1942, labor contracts for this bargaining unit have been negotiated in New York (A. 130). The contract challenged by the Employer required 35 to 49 negotiating sessions in 1969; all took place in New York (A. 103, 130). A written draft was signed in New York on October 30, 1969, effective upon ratification by the men, which was provided in time for the contract to be made effective on November 1, 1969. (A. 104, 105, 132, 133, 147; 271). On November 18, 1969, a "smooth final form" was re-executed in Beaumont (A. 106-107). The Beaumont event was a matter of proof reading against the draft which had been executed in New York (A. 134).

Because the work which is the subject of the collective bargaining agreement is performed on the ship, the terms of the agreement which deal with the employee's working conditions, and the Company's power to direct them, operate on shipboard. The seamen are paid in cash by the ships' masters (A. 124), payment being made in northern ports (A. 125).

Sixty percent of the job applications are made in Beaumont, Texas, and forty percent in New York; the final paper work takes place in Beaumont, Texas. Discharges may occur at the hands of the ship's masters at any place (A. 76, 184) but are subject to approval by Mr. Knepper in Beaumont (A. 76).

The collective bargaining agreement provides that any grievance is to be filed aboard ship, and the first three steps of the grievance procedure also take place on the ship. In the event of disagreement, the next step is at the Company's Beaumont office. (A. 95-96.) The contract provides for arbitration of unresolved grievances; all arbitrations have been held in New York. (A. 96, 136-137.)

II. *Proceedings Below*

A. *The District Court*

Mobil brought this suit under Section 301 of the Act for a declaratory judgment that the agency shop provision of the agreement was unlawful. The trial court made findings of fact, including that "A more substantial part of the administration of the collective bargaining agreement and the performance thereof occurs and takes place in the State of Texas *than in any other State.*" (Pet. App. 4d; emphasis added.) The court concluded that the Texas right to work law was applicable, that the agency shop is unlawful under Texas law, and that that clause is therefore unlawful.

B. *Court of Appeals*

On the Unions' appeal, a panel of the Court of Appeals reversed the judgment of the District Court by a 2-1 vote. Judge Ainsworth, waiting for the majority, reasoned:

"Conceding, arguendo, that the district court cor-

rectly found that a more substantial part of the administration and performance of the collective bargaining agreement occurs in the State of Texas than in any other state, such a finding is not decisive of the issues in this case. In making such a finding the district judge took into consideration various facts associated with Texas, and acts occurring therein, thereby weighing the interests of Texas against other states. In so doing the court failed to give proper consideration to the most important factor in the case, that is, the situs of the work performance of the covered employees. The trial judge, in written factual findings, held in this regard that

> 'Substantially all of the employees' work time is spent aboard Plaintiff's tankers, and such vessels are located on the high seas or in ports other than ports located in the State of Texas approximately 80% to 90% of the time, but at any given point in time one of the vessels generally is located in Texas or Texas waters.'

"Use of Employers' headquarters as the decisive criterion in this case would allow an employer to make an arbitrary choice, and could produce bizarre consequences. Headquarters could be shifted about by large national companies to states with favorable labor laws, such as the right-to-work statutes.

• • •

"Under the facts of this case the job situs of the employees is the most important and logical factor. As the Union has pointed out to us, Mobil's top headquarters is in New York, and prior to 1962 its Marine Transportation Department was likewise headquartered in New York. Thus, as the Union states, the change in headquarters from New York to Beaumont

did not substantially change the working location of the men which remained the same.

• • •

"State right-to-work laws are applicable only to employees of that particular state. The employees involved here are not for the purpose of their collective bargaining agreement employees of Texas or any other state—they are mobile, maritime employees, whose principal place of employment, or jobsite, is on the high seas." (Pet. App. 11b-13b.)

Judge Thornberry dissented. (Pet. App. 14b-16b.)

Mobil then successfully petitioned for rehearing *en banc*. The full Court, by an 8-6 vote, set aside the panel decision and affirmed that of the District Court. Judge Thornberry, now writing for the majority, emphasized that Texas had more significant contacts than any other State; he regarded of particular importance Texas' connection with the hiring process and the fact that it was the residence of more of the seamen than any other. He rejected the view, taken by the dissenting judges and by the N.L.R.B., that the job situs should be the controlling factor and determined that the high seas were not a jurisdiction with a policy on union security agreements. Concluding that there was no objection to extraterritorial application of the Texas right-to-work law, he held the agency shop to be unlawful. And, he refused, despite the residency of the majority of the employees outside Texas, to make the Texas right-to-work law inapplicable to them. On this issue, he held that the agreement could not be revised to have different classes of employees, and also that the record was insufficient to demonstrate "that there is an identifiable group of employees who are not subject to the Texas law." (Pet. App. 1a-22a.)

Judge Ainsworth wrote a dissenting opinion on the merits, in which he was joined by Judges Brown, Dyer, Simpson, Morgan and Roney. (Pet. App. 22a-31a.) Judge Brown, joined by Judge Dyer, also wrote a dissenting opinion urging that the Court should have deferred to the N.L.R.B. regarding the proper interpretation of the Act in this context. (Pet. App. 31a-36a.)

SUMMARY OF ARGUMENT

1. An understanding of the limited function of § 14(b) of the National Labor Relations Act ("NLRA"), added in 1947 as part of a careful Congressional reassessment of the entire problem of discrimination in employment based upon membership or non-membership in a labor organization, is critical to the decision of this case. It was determined in 1947 that a national policy prohibiting preexisting union membership as a condition of initial hiring and providing that no employee can be required to join a union during the first thirty days on a job was necessary to eliminate barriers to free employment. This policy was embodied in the provisos to § 8(a)(3) of the NLRA as amended. Section 14(b) was added only to make certain that states would retain their *previous* authority to ban union security agreements relating to continuation of employment *after* the initial hiring and 30-day period for which § 8(a)(3) prescribed a uniform, national policy. (*Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 751.)

2. The basic issue in this case is identifying the method to be used and the factors to be considered in determining which jurisdiction's policy regarding the validity of union security clauses relating to continuation of employment is

to be given effect, when the relationship between the employer and the employees touches two or more jurisdictions. The Court of Appeals sanctioned weighing *all* the contacts with the various jurisdictions concerned, giving dominant consideration to the location of the final hearing decision and thereby approving an extraterritorial effect of a state's law upon some employees who are not present within its borders. The Court of Appeals approach is based upon a complete misunderstanding of the purposes of § 14(b) and of its place in the overall scheme of the Act.

First, § 14(b) was intended to make clear that each state may determine its own policy regarding the union security clauses within its scope. To sanction an extraterritorial effect of one jurisdiction's policy upon that of another is to undermine that principle.

Second, certain factors given great weight by the Court of Appeals are, by reason of the limited scope of § 14(b), entirely irrelevant in determining its application. Since § 14(b), like the NLRA generally, is concerned only with the employment relationship, factors unrelated to that relationship, such as the residence or domicile of either the employer or employee, should not be considered at all. And since Congress' concern with hiring policy as it relates to union security agreements was taken care of by enacting a uniform national policy on this matter, the place of hiring, as the dissenters below carefully explained, should be of no import in determining the geographical reach of state laws which cannot alter this nationally-applicable policy.

Third, the Court of Appeals approach introduces a regime of uncertainty about which jurisdiction's policy gov-

erns under § 14(b) and permits either or both parties to affect the applicable law by manipulating factors with no real impact upon the employees' work.

Once the function of § 14(b) is understood, certain principles emerge for determining which jurisdiction's § 14(b) policy governs a particular employee-employer relationship. These are that the test used should limit extraterritorial application of a state's policy, be based on the employment relationship, center on the continuity of the employment relationship once established, and focus on one or a limited number of factors.

The contact with a jurisdiction which, under these principles, ordinarily should govern is the one the Court of Appeals rejected as having any relevance—the job site. Moreover, the language of § 14(b) indicates that the location where the work is done controls. And the NLRB's practice, entitled to particular respect under the doctrine of *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, is in accord both with the general principles enunciated above and with the choice of job site as the factor ordinarily to be controlling under these principles.

3. The job sites here were American flag vessels on the high seas. While the Court of Appeals appeared to presume that only the interests of *states* are relevant under § 14(b), in fact there are jurisdictions, such as the District of Columbia, exclusively under Congressional control, whose policies regarding union and agency shops are also protected by § 14(b). Since Congress has not passed right-to-work laws with regard to such jurisdictions, union and agency shop agreements are valid with regard to employees

working therein. And the sovereign law-making authority with regard to the internal economy of American flag vessels on the high seas is, by virtue of art. III, § 2 of the Constitution, the United States Congress. (*United States* v. *Flores,* 289 U.S. 137.) Indeed, Congress has imposed extensive regulation upon the employment of seamen on the high seas; as the dissenters below noted, "state regulation of this employer-employee relationship stops at the water's edge." (Pet. App. 26a-27a.) Thus, while there are borderline situations in which state law can constitutionally affect matters arguably within the maritime power, federal authority over an agreement for employment on the high seas is exclusive. (*Union Fish Co.* v. *Erickson,* 248 U.S. 308; *Kossick* v. *United Fruit Co.,* 365 U.S. 731, 741.)

4. Since these employees work on American flag vessels on the high seas, and since the law-making authority governing the employment of seamen on the high seas, the United States, has not forbid union and agency shop agreements, the agreement here is valid. Moreover, even if the contact weighing approach of the Court of Appeals were used, the contacts with Texas do not predominate once the fact that the employees perform nearly all their work on the high seas, a separate jurisdiction for purposes of this case, is taken into account. Finally, the Court of Appeals was in error, even upon its own view of the case, in not validating the agency shop agreement as to those employees who applied for jobs and/or reside in New York.

ARGUMENT

I. Introduction—The Function of § 14(b) in the NLRA

Section 14(b) of the National Labor Relations Act

provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

That Section was added to the Act in 1947 as part of a thorough review of federal policy toward discrimination in employment based upon membership or non-membership in a labor organization. To understand its limited thrust, it will be helpful to review the background of its enactment.

The state of the law before 1947 was explained by this Court in *Labor Board* v. *General Motors*, 373 U.S. 734, 738-740:

> "Section 8(3) under the Wagner Act was the predecessor to § 8(a)(3) of the present law. Like § 8(a)(3), § 8(3) forbade employers to discriminate against employees to compel them to join a union. Because it was feared that § 8(3) and § 7, if nothing were added to qualify them, might be held to outlaw union-security arrangements such as the closed shop, see 79 Cong. Rec. 7570 (statement of Senator Wagner), 7674 (statement of Senator Walsh); H.R. Rep. No. 972, 74th Cong., 1st Sess. 17; H.R. Rep. No. 1147, 74th Cong., 1st Sess. 19, the proviso to § 8(3) was added expressly declaring:
>
> '*Provided*, That nothing in this act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein, if such labor organization is the

> representative of the employees as provided in section 9(a)....'
>
> "The prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to § 8(3) covered both the closed and union shop as well as less onerous union-security arrangements, if they were otherwise legal."

In 1947, Congress reconsidered the rule embodied in the proviso to § 8(3). Indeed, that reconsideration was one of the major issues debated during the process of revising the Wagner Act. The Report of the Senate Committee on Labor and Public Welfare noted: "A controversial issue to which the committee has devoted the most mature deliberation has been the problem posed by compulsory union membership." (S. Rep. No. 105, 80th Cong., 1st Sess. (1947), p. 5.) The Committee Report observed that "abuses of compulsory membership have become so numerous there has been great public feeling against such arrangements" but also that "leaders of organized labor have stressed the fact that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost." (*Id.* at 6.) And the Report explained that "The committee has taken into consideration these arguments in reaching what it considers a solution of the problem which does justice to both points of view." (*Id.*)

The solution reached by the Senate and ultimately adopted was a detailed compromise fully explained in the Senate Report. Primarily, it was concluded that "it is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too

great a barrier to free employment to be longer tolerated." (*Id.*) On the other hand, it was determined that:

> "[E]mployers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired if a majority of such employees have shown their intent by secret ballot to confer authority to negotiate such an agreement upon their representatives. But in order to safeguard the rights of employees after such a contract has been entered into, two additional safeguards are provided: (1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues; * * *" (*Id.* at 7.)[4]

It was therefore believed that:

> "these amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." (*Id.*)

Thus, the decision made was to enlarge the prohibition against employer "discrimination in regard to hire and tenure of employment" by altering the proviso to former § 8(3) so as to state a uniform Federal rule governing "hire" and the first 30 days "tenure of employment." That rule is that employers may neither prefer nor disfavor union members in the hiring process and that no employee

[4] The Senate Committee proposed a third protection (for persons "denied membership (for) work[ing] for the change of a bargaining representative") which was not enacted.

can be required to join a union during those 30 days.

After 30 days, however, union membership could be required by agreement (subject to the restrictions described in the Senate Report). But with respect to *this* privilege the general policy of uniformity gave way: by virtue of § 14(b) the States retained their prior authority to enact legislation declaring any agreements limiting tenure of employment to union members invalid.

As this Court recognized in *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 751 (footnote omitted, emphasis supplied):

> "As is immediately apparent from its language, § 14 (b) was designed to prevent other sections of the Act from completely extinguishing state power over *certain* union-security arrangements. And it was the proviso to § 8(a)(3), expressly permitting agreements conditioning employment upon membership in a labor union, which Congress feared might have this result. It was desired to 'make certain' that § 8(a)(3) could not 'be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy.' H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. L.M.R.A. 564."

II. The Jurisdiction in Which Employees Work Controls the Legality of Union Security Provisions Covering Those Employees

The basic issue before the Court in this case is the effect of § 14(b) in a situation in which the relationship between the employee and the employer touches two or more jurisdictions. The problem can arise in many forms, of which we offer several. A labor agreement may be executed in

one state between a corporation headquartered in that state and a labor organization representing employees all of whom work entirely in another jurisdiction, with contrasting union security policies in the two jurisdictions. A single agreement between a national company and a national labor organization may cover plants in both right-to-work and non-right-to-work jurisdictions. (An example of this was before this Court in *General Motors, supra.*)[5] Or an agreement could cover employees who perform their work primarily in a jurisdiction with one union security policy but perform some small portion of their duties in a jurisdiction with a contrasting policy. Finally, the employees themselves may be peripatetic, working each day in several jurisdictions with contrasting union security policies, with no one jurisdiction clearly predominant.

The Court of Appeals correctly described its "task" as being "to discover whether applications of the Texas right to work law would be in furtherance of the Taft-Hartley Act's expressed purposes." (Pet. App. 6a-7a.) However, it proceeded on a misunderstanding of those purposes, and particularly of the function of § 14(b). For, the Court concluded that Section 14(b) was primarily concerned with state regulation of the hiring process, and while it purported to "weigh all of the employer and employee contacts" (Pet. App. 17a), it singled out the place where the

[5] There the agreement provided for maintenance of membership and the union shops, but these provisions "were not operative • • • in such States as Indiana where state law prohibited making union membership a condition of employment." (373 U.S. at 735-736.) The problem in *General Motors* arose because Indiana qualified its prohibition against union security agreements by allowing the agency shop.

hiring decision was made as the contact entitled to dominant consideration. (Pet. App. 11a-13a.) Recognizing that as a consequence of this approach, and particularly of the special significance attached to the place where the company made its final hiring decision,[6] a state's right to work policy could have an extraterritorial impact upon employees who never stepped a foot in Texas, the court concluded that § 14(b) condones such control by one state over employees who work entirely outside that state. (Pet. App. 13a-14a, n. 12.)

The Court also considered other contacts which appear to have no possible relationship to the purposes of Section 14(b), such as the place where the employees "send their children to school," or where they take their vacations. (Pet. App. 15a.) Yet, it deprecated the one factor which in our view, and in the view of the dissenters, is the most significant of all—namely, the place where the employees perform their work. For the reasons stated below, we believe that this factor, rather than those relied on by the majority below, should be the controlling one.

A. As explained, *supra*, part I, § 14(b) incorporated no policy of its own regarding union security clauses within its scope, but merely made clear that each state was free to pursue its own policy to prohibit or allow such agreements. Inherent in the rule that each State may determine its own policy is the principle that it may not be deprived of that opportunity by another State. It would be to little

[6] In fact, many of the employees applied for jobs and were notified of their acceptance outside of Texas; they were "hired" in Texas only in the special sense that the employment papers were processed there.

avail, for example, to assure Texas of its freedom from federal intrusion upon its right to work policy, if Louisiana's policy favoring union security agreements were applicable to any agreement signed in Louisiana, even if the day-to-day contacts between the employees and the employers occurred entirely in Texas. Thus, in each case in which more than one jurisdiction has some involvement a choice must be made as to *which* jurisdiction's law governs. The ultimate issue is to define the method by which this choice of law problems is to be resolved. By accepting extraterritorial application of one jurisdiction's prohibition of the agency shop, the court below disrespected the Congressional policy of neutrality. The court of appeals erred further in its identification of the contacts which should govern the choice of law.

B. First, it must be remembered that the NLRA is a *labor relations* statute, which focuses on the employer-employee relationship. This factor immediately limits the contacts with a state which are relevant to application of any part of that statute. For example, the residence or domicile of either the employees or the employer, if the entire employment relationship existed elsewhere, would seem so unrelated to the basic thrust of the federal statute as to be irrelevant to this choice of law problem.

Thus, if employees live in Louisiana but work in Texas, the fact that Louisiana is not a right to work state should have no impact whatever upon the application of the Texas right to work law, since § 14(b), like the NLRA generally, is concerned only with individuals as workers, not with other aspects of their lives generally. Similarly, if a company incorporated in Louisiana operates a plant in Texas

and employs individuals who spend their entire working day in Texas, the fact that the state of incorporation permits union security clauses must be irrelevant, since no portion of the employment relationship occurs in that State. Residency, and related factors, would be relevant, indeed controlling, if this case involved a choice of which law governed the employees' right to vote in public elections, their duty to pay local taxes or the conditions for obtaining a divorce.

Moreover, a proper consideration of the particular concerns of § 14(b) eliminates as a relevant factor the place of hiring upon which the majority relied most heavily.[7]

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[7] "When the Congress prohibited the closed shop while permitting the union shop in the Taft-Hartley Act, the Congress was demonstrating its concern with the process by which men and women were hired. As conceived by that legislative body the closed shop enabled union hiring halls to control absolutely the pool of labor available to an employer. H.R. Rep. No. 245, 80th Cong., 1st Sess., 1 Leg. Hist. L.M.R.A. 295, 300. The hiring decisions was, in effect, made by the union hiring hall, for the employer never saw a job applicant unless the applicant had been referred by the union, and of course, only union members were referred. The Congress singled out the maritime industry as a serious problem area. The legislative history of the Act exhibits an express intent to give to the employer some measure of freedom in the hiring process. See H.R. Rep. No. 245, supra; see also, e.g., 93 Cong. Rec. A1297 (1947) (remarks of Representative Gerald Landis) and 93 Cong. Rec. A2011 (1947) (remarks of Representative Hugh Meade), *infra* at note 11. The union shop agreement permits an employer to hire a person who has not, at or before the moment of hiring, joined the union. With the proscription of the closed shop, union hiring halls are now required to refer job applicants on a nondiscriminatory basis, so that an employer may consider nonunion applicants on an equal basis with union applicants. NLRB v. Houston Chap., Asso. Gen. Con. of America, Inc. [349 F.2d. 449

For, the majority's reading of the legislative history, which was the basis for its view, is entirely unsound. As the dissenting opinion of Judge Ainsworth carefully demonstrates, the problem of the hiring hall, of discrimination in hiring generally and of compulsory union membership during the first 30 days of employment, were all regulated through the uniform federal rules stated in § 8(a)(3); § 14(b) does not touch these problems at all:

> "The majority opinion places much emphasis on the legislative history of the Taft-Hartley Act, concluding that it indicates great concern with the hiring process and a willingness to substitute state law for federal standards where appropriate. Congress was in truth concerned about the adverse impact of compulsory unionism on the hiring process, but section 14(b) was not, as the majority suggests, designed to be the remedy for these ills. Section 14(b) was inserted into the Taft-Hartley Act merely to restate preexisting law, not to expand the jurisdiction of states relative to employment conditions involving maritime workers, traditionally the subject of Federal law. The National Labor Relations Act (Wagner Act) itself was not intended to override state laws regulating the closed shop. Congressional amendment of what is now section 8(a)(3) of the Labor Management Relations Act, 29 U.S.C. § 158(a)(3), not the inclusion of section 14(b), was the

(5th Cir. 1965)]. In short, if the congressional discussion on compulsory unionism could be said to have any single reference point, it is not job situs but the hiring process. And in our judgment, the language of section (14b) which looks to the "execution or application" of agreements requiring membership as a condition of employment refutes the notion that Congress was suddenly singularly concerned with the job situs of the employee rather than with the effects of such an agreement on men and women seeking employment in a mobile society." (Pet. App. 11a-13a)

chief tool designed to alleviate the perceived evils of compulsory unionism.

> "A careful reading of the legislative history of the Taft-Hartley Act shows that Congress felt that section 8(a)(3) would curb problems in the hiring process by removing prior union membership as an employment prerequisite and by providing that expulsion from a union would not necessitate discharge from employment so long as initiation fees or dues were not delinquent. Senator Taft noted in debate that a prime example of problems generated by the closed shop was in the West Coast shipping industry. He then outlined the changes that would be made by section 8(a)(3) and, with no reference whatever to section 14(b), concluded that the abuses in the hiring process would thereby be corrected. Congress did indeed single out the maritime industry as a serious problem area, as noted by the majority opinion (ante, p. 11a & n. 10). The cited provisions of the legislative history, however, make no reference to section 14(b) as a palliative for these problems; rather, the amendments to section 8(a)(3) were deemed fully capable of solving these problems. Since the agency shop provision before us avoids the evils in the hiring process Congress was trying to correct, and since it is clearly valid under section 8(a)(3), it cannot be validly concluded that enforcement of this provision is contrary to federal labor policy." (Pet. App. 27a-30a).

A concomitant principle inherent in the background of § 14(b) is that the decision as to which law governs must be relatively foreordained and not subject to manipulation by either or both of the parties. The Court of Appeals seeks to assume that its analysis would not sanction a "truly arbitrary choice" of state law achieved by manipulating an employer's operations (Pet. App. 18a). But Judge Ains-

worth is surely correct when he points out that this case could not have been decided as it was if Mobil had not moved its intermediate level headquarters to Beaumont, although that change made no difference in the covered employees' working location or conditions. (Pet. App. 11b-12b). And while § 14(b) contemplates disuniformity in union security policy among jurisdictions, it certainly did not intend to institute a regime of uncertainty about which jursdiction's law governs in a given situation. Yet, the multiple contacts approach of the Court of Appeals invites just such uncertainty and conflict by its inherent imprecision. One of the motivating forces behind the 1947 amendments was the felt necessity to bring stability and certainty into collective bargaining relationships.

The foregoing establishes at least four propositions which must govern the decision as to which jurisdiction's policy on the union shop may be applied to determine the validity of any particular agreement. First, the test should not permit one jurisdiction to dictate policy on the union shop to another. Second, the test must be based upon the employment relationship between the employee and the employer, and not any factors which concern one or the other party but are irrelevant to that relationship. Third, the test must center upon the continuity of the employment relationship once established, for that is the field within which the states are free to vary the federal substantive law stated in § 8(a)(3). Finally, the test should focus upon one or, at best, a limited number of factors, so as to prevent uncertainty and manipulation.

C. Given the nature of the relationship regulated, the one factor which should determine which jurisdiction's union

security policy controls is the one which the majority below rejected—the job situs, where the day-to-day contact between the employer and the employees occurs. It is in that jurisdiction that the employment relationship is centered and that effect of a union security clause governing continued employment, or the lack thereof, will be felt. In only rare instances will that location be subject to legitimate controversy. Moreover, that factor cannot be manipulated upon the whim of the parties to render contracts valid or invalid.

The language of § 14(b) itself points in this direction. The section says that the Act does not authorize agreements "requiring membership in a labor organization as a condition of *employment in* any State or Territory" (emphasis supplied) in which such agreements are illegal.[8] The normal understanding is that an individual's place of em-

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[8] Since § 14(b) refers specifically to "execution or application" of the prohibited agreements, and permits states and territories to bar either execution or application, or both. The obvious purpose of expressly permitting jurisdictions to prohibit execution *and* application is to permit them to protect employees against the felt compulsion to join a union because of the very existence of the agreement, rather than only against discharge if they fail to join. Moreover, no conceivable Congressional purpose would be served by reading § 14(b) as authorizing a state to prohibit the execution within its boundaries of a union security agreement which is to be applied entirely in another state (or states) in which such agreements are permitted. For example, if a company headquartered in Texas owned a plant in Louisiana, and conducted its labor negotiations in Texas, that company should not be prohibited from entering into a union security agreement with respect to its Louisiana plant merely because the negotiation and execution of the agreement happened to occur in Texas.

ployment is where he works, not, for example, the employer's administrative headquarters.

The administrative practice of the NLRB is in accord. The Board developed its rules for applying section 14(b) in a multi-state situation in a series of cases concerning § 9(e) of the Act, since revised, which then required an election among employees to authorize the negotiation of a union security agreement.[9]

First, in a case in which some employees of a District of Columbia corporation did all their work in the District, a non-right to work jurisdiction, and others did all their work in Virginia, a right to work jurisdiction, the Board held that no union security agreement would be valid with regard to the employees in Virginia, but that those employees working in the District could enter into a union security agreement if the necessary proportion of them so voted. *Giant Food Shopping Center, Inc.*, 77 NLRB 791, 794-95 (1947). Thus, the Board adopted the basic proposition that, when employees spend their work days within a given jurisdiction, that jurisdiction's union security policy is to be given effect under § 14(b).

The second case, *Northland Greyhound Lines Inc.*, 80 NLRB 288 (1948), considered the much more complex situation of employees who by the nature of their employment travelled continually from right to work to union security

[9] The experience under § 9(e) as originally enacted was that employees authorized union shop agreements in 97% of elections. In 1951, Congress responded by eliminating the authorization requirements, substituting therefor a deauthorization election at the request of 30% of the employees in a bargaining unit. Act of October 22, 1951, C. 534, 51 (c, d), 65 Stat. 601.

jurisdictions. In approaching the question, the Board first adopted precisely the governing principles we have spelled out above: It concentrated upon a search for the "focal points of the *employment relationship*" (*id.* at 29; emphasis supplied), and consequently rejected the relevance of factors such as residence of employees and the place where the employees were hired. (*Id.*) Moreover, the Board recognized that under § 14(b) the "test to determine which State law shall control [should] result in the least amount of extraterritorial effect being given to the laws of one state as against those of another." (*Id.*)

The application of the principles enunciated, however, was more difficult than it had been in *Giant Food,* and than it is in this case, because the work day was spent not in any one jurisdiction exclusively or predominantly, but, instead, at least for many of the employees, was spent continually moving between jurisdictions with differing union security policies. Therefore, the Board could not apply a simple job situs test but, instead, had to find a substitute which it determined to be the *employees'* "headquarters," where they "report to work, receive instructions, and are paid their salaries." The Board adopted this location because for these peripatetic employees it was the focus of their employment relationship.

Finally, in *Western Electric Company, Inc.*, 84 NLRB 1019 (1949), a case in which the employees moved about relatively often, but apparently spent sustained periods of time within particular jurisdictions, each employee was held to be "subject to the law of the state in which his job site is located at the eligibility date [for the election]" (*id.* at 1023). The Board *rejected* the contention that the

law of the state in which was located the division of the company in charge of the employees and with whom grievances were processed governed. (*Id.* at n. 15.)

Since the Board's resolution of this conflict between jurisdictions was necessary to its administration of the Act, its practice in this regard is a classic instance of the kind entitled to respect under the doctrine of *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315: "[t]he practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new."

Thus, the language of § 14(b), the principles which logically flow from its function, and the practice of the agency charged with administration of the Act generally, developed when the statute was first in effect, all support the view, shared by the dissenting judges below, that the paramount consideration in determining the jurisdiction whose law is to govern under § 14(b) is the place where the employees spend all or almost all of their working time.

III. The Job Situs Here Is In the National Maritime Jurisdiction In Which Union Security Agreements are Permitted

The court below was confronted with the undisputed finding that 80% to 90% of the work was performed on American flag vessels on the high seas.

These facts were lost in the backwash of two critical rhetorical questions:

> "The high seas definitely have contact with the employees, but what is the interest of the high seas in preventing application of the Texas law? How is some important non-Texas, national, or international policy furthered by refusing to apply the Texas law?"

Of course, the high seas, as such, have no interest in the scope of the application of the Texas right to work law, but this is equally true of the deserts of Texas. In determining what law applies, it is the interests of sovereign law-making authority that are determinative. The majority below apparently believed that there are no sovereign authorities other than the States with respect to American flag vessels on the high seas, or that only the interest of the States, as such, are pertinent in identifying the jurisdiction whose § 14(b) choice controls.

That the NLRA covers jurisdictions as to which the law of no state controls is clear from the fact that the NLRA is applicable in the District of Columbia.

The problem presented here of determining whether a state right to work law is applicable where the employment relationship spans more than one jurisdiction can, and indeed regularly does, arise with respect to employees who work in Virginia (which prohibits the union shop) and in the District of Columbia (cf. *Giant Food, supra*). For the District is not a right to work jurisdiction because Congress, which in constitutional contemplation has the same legislative authority in the District as Texas has within its borders (see *Palmore* v. *United States*, 411 U.S. 389, 397) has chosen to permit the union shop. Thus, the national interest in the non-application of Virginia's right to work law in the District is the same as Maryland's interest in not having Virginia's right to work law applicable in Mary-

land. By recognizing the option of each State to determine its own policy within its borders, and by permitting the union shop within the non-state areas of its sovereignty, Congress necessarily contemplated parity among the States and among jurisdictions generally. It is this parity—this neutrality between right to work and union shop jurisdictions—that requires the construction of § 14(b) (developed above) that limits insofar as possible extraterritorial application of the differing policies permitted by the NLRA.[10]

The first proposition that appears to be implicit in the Court of Appeals' opinion, that the high seas are a jurisdiction in which there is no sovereign law-making power, is erroneous on more fundamental and, indeed, constitutional grounds. There is such a sovereign, and by virtue of art. III, § 2 of the Constitution, that sovereign is the United States. A particularly lucid statement of the constitutional history is that of Mr. Justice Stone for a unanimous Court in *United States* v. *Flores*, 289 U.S. 137:

> "Before the adoption of the Constitution, jurisdiction in admiralty and maritime cases was distributed between the Confederation and the individual states. Article 9 of the Articles of Confederation provided

[10] The lower court's opinion reveals its failure to appreciate the essential neutrality of § 14(b): "[A]llowing Texas to apply its laws here is in furtherance of the national labor policy." (Pet. App. 17a). This statement has no basis in any manifestation of the "national labor policy." For § 14(b) does not *prefer* right to work laws; on the contrary, the rule declared by Congress is that unless a jurisdiction acts expressly to prohibit the union shop, it is lawful within its territory. Moreover, and critically for purposes of this case, where Congress itself has plenary jurisdiction, as in the District of Columbia, it has chosen to permit such agreements.

that 'the United States, in Congress assembled, shall have the sole and exclusive right and power . . . of establishing rules for deciding in all cases, what captures on land or water shall be legal . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures . . .' So much of the general admiralty and maritime jurisdiction as was not included in this grant of power remained with the states. The powers thus granted were in substance the same as those later conferred on the national government by Article 1, § 8 of the Federal Constitution. This section was adopted to carry out a resolution of the Convention 'that the national legislature ought to possess the legislative rights vested in Congress by the Confederation.' Its primary purpose and effect was to transfer to the newly organized government the powers in admiralty matters previously vested in the Confederation.

"A proposal independently made and considered in the Convention that 'the admiralty jurisdiction ought to be given wholly to the national government,' resulted in the adoption of Article 3, § 2, by which the judicial power of the United States was extended to all cases of admiralty and maritime jurisdiction.

"This section had been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies, and, by implication, conferring on Congress the power, subject to well recognized limitations not here material,[4] to

[4] In Panama R. Co. v. Johnson, 264 U.S. 375, 386, 387, the Court said: 'When all is considered, therefore, there is no room to doubt that the power of Congress

alter, qualify, or supplement it as experience or changing conditions may require. Panama R. Co. v. Johnson, 264 U.S. 375, 386, 388; Crowell v. Benson, 285 U.S. 22, 39, see The Oconee (D.C.) 280 Fed. 927; United States v. Bevans, 3 Wheat. 336, 389.

"In view of the history of the two clauses and the manner of their adoption, the grant of power to define and punish piracies and felonies on the high seas cannot be deemed to be a limitation on the powers either legislative or judicial, conferred on the national government by Article 3, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the States, was transferred to the national government. It would be a sur-

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extends to the entire subject and permits of the exercise of a wide discretion. But there are limitations which have come to be well recognized. One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments,—when not relating to matters whose existence or influence is confined to a more restricted field, as in Cooley v. Port Wardens, 12 How. 299, 319,—shall be coextensive with and operate uniformly in the whole of the United States. Waring v. Clarke, 5 How. 441, 457; The Lottawanna, 21 Wall. 558, 574, 577; Butler v. Boston & S.S.S. Co. 130 U.S. 527, 556, 557; Re Garnett 141 U.S. 1, 12; Southern P. Co. v. Jensen, 244 U.S. 205, 215; Knickerbocker Ice Co. v. Steward, 253 U.S. 149, 164; Washington v. W. C. Dawson & Co. 264 U.S. 219, 2 Story, Const. 5th ed. §§ 1663, 1664, 1672."

> prising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of government powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the national government powers which were common attributes of sovereignty before the adoption of the Constitution."

Not only does the foregoing conclusively establish the constitutional authority by virtue of art. III, § 2 of the United States over American flag vessels on the high seas, equivalent to its constitutional authority of the District of Columbia or Territories, but it refutes in terms the view of the Court of Appeals that Congress' only authority to legislate concerning conduct on the high seas is derived from art. I, § 8, cl. 3, which grants the power to regulate interstate and foreign commerce. That view is expressed in the sentence immediately following the questions quoted earlier and is apparently the basis of the Court's answer that there is no interest militating against the application of the Texas right to work law.

> "The fact that maritime work is interstate, or even international, in character does not imply that the Texas law is inapplicable since federal regulation in these matters is predicated upon interstate commerce." (Pet. App. 16a)

Pursuant to the admiralty and maritime jurisdiction Congress has developed a vast, all-pervasive and detailed body of statutory law regulating the employer-employee

relationship of blue water seamen. As the dissenters in the Court of Appeals noted:

> "Unlike the land-based worker, the seaman's employment and all of the rights and restrictions flowing therefrom are determined by federal statutory and admiralty law, not state law. Hiring, discharge and various terms of employment are regulated by shipping articles mandated by federal statute [46 U.S.C. §§ 563-568, § 713]. Compensation to seamen for illness, injury, disability and death is provided through the unique admiralty doctrine of maintenance and cure, and by special federal statutory enactments such as the Jones Act [46 U.S.C. § 688]. and the Death on the High Seas Act [46 U.S.C. §§ 761-768]. Federal maritime law covers the gamut of a seaman's employment relationship, including wages [46 U.S.C. §§ 682-685], maritime liens for the collection therefore [46 U.S.C. § 953], the protective procedures against attachment and assignment of wages [46 U.S.C. § 601], the rights accorded seamen to receive at every port half of unpaid wages earned [46 U.S.C. § 597] and double payment for wages withheld without sufficient cause [46 U.S.C. § 596], physical qualifications and requirements for seamen [46 U.S.C. § 672] and disciplinary problems [46 U.S.C. §§ 701-710]. In no employment field is the master-servant relationship so predominantly controlled by federal maritime law than in that existing aboard ship between the master of the vessel and the men who man it. *Indeed, it does not appear that there is any aspect of the employment relationship which Texas law may properly control—except, of course, for the novel injection of Texas' right to work law into the present labor contract. In practical effect, state regulation of this employer-employee relationship stops at the water's*

edge." (Pet. App. 26a-27a; emphasis supplied.)[11]

We are well aware that there has been considerable litigation regarding "the perverse and casuistic borderline situations" (*Executive Jet Aviation* v. *City of Cleveland*, 409 U.S. 247, 255) in which the admiralty jurisdiction may arguably be invoked. Thus, there is a presently indeterminate area within the constitutional admiralty power which is also subject to the jurisdiction of the States. The instant case, however, is "comfortably within the circle and far from the penumbra" (*id.* at 248) of the admiralty jurisdiction which is exclusively federal, for it involves the terms and conditions of employment of seamen who work on American flag ships on the high seas. In a relatively recent case which acknowledged the existence of some residual state power, *Kossick* v. *United Fruit Co.*, 365 U.S. 731, Justice Harlan stated: "Without a doubt a contract for hire

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[11] In addition the nationality of officers and crews is effectively controlled by 46 U.S.C. 672(a) so as to require as a practical matter 75% U.S. citizenship for unlicensed members of the crew. The same statute specifies the requirements for certification as an able seaman by the Coast Guard. Suspension or revocation of certificates of service for misconduct may occur following appropriate notice and hearing before a hearing officer of the Coast Guard. 46 U.S.C. 672(h); 46 U.S.C. 239(g). This statute effectively regulates the very right to go to sea.

Hours of work at sea or in safe harbor are governed by 46 U.S.C. § 673, as is work on holidays. The same statute covers assignment of work; a seaman who has signed on the Deck Department may not be required to work in the Engine Department, and vice versa.

Discipline of seamen, including criminal liability for drunkenness or neglect of duty is covered by a series of enactments. 46 U.S.C. § 701; 18 U.S.C. § 2196. Seamen are also protected against cruelty or abandonment. 18 U.S.C. § 2191; 18 U.S.C. § 2195.

either of a ship or of the sailors and officers to man her is within the admiralty jurisdiction. 1 Benedict, Admiralty, 366." (*Id.* at 741.)

In *Kossick*, it was held that the New York statute of frauds did not apply to an oral contract made in New York whereby a ship owner agreed to assume all consequences of faulty medical treatment of a seaman by the Public Health Service Hospital. *Kossick* reaffirmed and even extended *Union Fish Co.* v. *Erickson*, 248 U.S. 308 (1915), where the Court held that the California statute of frauds was not applicable to an oral agreement made in California for the performance aboard ship of a master's services. The Court said:

> "In entering into this contract, the parties contemplated no services in California. They were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of America, mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California." *Id.* at 313.

So here "the parties contemplated no services in Texas." Rather, they "were making an engagement for the services of [the seamen] of the vessel, the duties to be performed in the waters of America mainly upon the sea."

Thus, the answer to the rhetorical question posed by the majority below is that for the purposes of the instant case the high seas are a jurisdiction separate from the individual states and that in this jurisdiction the sovereign law-making power is the United States by virtue of art. III, § 2. This case does therefore present a genuine choice-of-law

problem, just as did *Giant Food, Northland Greyhound Lines* and *Western Electric, supra.* And, for present purposes the critical point is that the high seas, like the District of Columbia, are a jurisdiction in which there is no right to work law. Congress, the supreme legislative authority by virtue of art. III, § 2 over American flag vessels on the high seas, and over the District of Columbia under art. I, § 8, cl. 17, has chosen not to exercise that authority to forbid union security agreements, just as Louisiana has chosen not to exercise its § 14(b) option. Texas' authority to apply its right to work law in this case is governed by the same analysis as if the work performed on the high seas on this record were actually performed in Louisiana.

Again, to put the matter another way, § 14(b) only preserves the authority of the States to regulate union security agreements which they had prior to the Wagner Act; that is, it is a disclaimer of a legislative attempt to exercise the commerce power in a manner to oust pre-existing State authority. But the States enjoyed no such authority with respect to employment relations on the high seas. Indeed, as *Flores* teaches, the States had surrendered much of that authority even under the Articles of Confederation. And the internal economy of a ship on the high seas is at the heart of the federal maritime jurisdiction.

For the converse of the proposition that the law governing the internal economy of an American ship on the high seas is the law of the United States is that it is not subject to State law. The latter proposition was early declared by Mr. Chief Justice Marshall in characteristically unmistakable terms:

> "What, then, is the extent of jurisdiction which a

state possesses?

"The answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power." *United States* v. *Bevans*, 3 Wheat. 336, 386-387.

CONCLUSION

In our view the critical contact governing § 14(b) choice of law problems is the place where the employees work. Here, that place is an American flag vessel on the high seas. There, the United States is the law-making authority and it has not exercised that authority (as did Texas where it has such authority) to forbid union shop and agency shop agreements. Accordingly, the agency shop agreement in this case is lawful as to all employees.[12] The

[12] The Court of Appeals did not determine whether, "weigh[ing] all of the contacts in the context of our national labor policy" (Pet. App. 5a), those of the high seas or those of Texas were "qualitative[ly]" (*id.*, 6a) more significant. We submit that Texas law cannot prevail in making this comparison when Congressional policy and the facts in this case are viewed more accurately than in the majority opinion. For, as we have shown earlier, neither the place of hire nor the residence of the seamen plays an important role in terms of Congressional policy; these are the factors to which the majority gave the greatest weight and which it said justified the application of Texas' law to this situation. Moreover, the Court was plainly in error in its statement that "As many as 60% of the applicants actually come from the Texas labor force," (Pet. App. 4a, repeated at Pet. App. 15a), a matter of particularly great importance to the majority (*id.*, 14a-15a). That fact is not only unsupported by the record but is contrary to the undisputed evidence, and the findings (Pet. App. 2d-3d, ¶ 11) that 123 of the 289 seamen (that is, well under half) have their residence in Texas. The circumstance that both the residence and the place of hire varies from employee to employee is yet another reason for holding that these contacts are entitled to little weight compared with the facts common to all employees relating to their place of work.

A final point remains to be made. If, contrary to all the foregoing, the place of hire is given decisive weight, the agency shop agreement should be preserved as to those employees who make their job applications in New York; and, if residency is controlling, it should be preserved as to the employees who reside in jurisdictions which have not outlawed the agency shop. The contract would not thereby be "rewritten," as the majority in the Court of Appeals charged (Pet. App. 21a); it would be respected. For Article 1 of the agreement (A. 285) provides:

II. VALIDITY

In the event that any provision of this Agreement shall at

judgment of the Court of Appeals should be reversed, and the case remanded with directions to enter a judgment which so declares.

Respectfully submitted,

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> any time be declared invalid by any court of competent jurisdiction, such decision shall not invalidate the entire Agreement, it being the express intention of the parties hereto that all other provisions, not so declared invalid, shall remain in full force and effect, and both parties will meet within ten (10) days to attempt to work out a new Agreement on those matters that were invalidated.
>
> In the event that any competent authority enacts any law or regulation requiring additional compensation to personnel covered by this Agreement, the provisions of this Agreement pertaining to wages and vacation-paid leave may be cancelled by the Company. In the event of such cancellation, both parties to the Agreement will meet within ten (10) days to attempt to work out a new agreement on those matters. This is not for the purpose of reducing monthly compensation through wage rates or vacation-paid leave."

This brings into play the principle of *Labor Board* v. *Rockaway News*, 345 U.S. 71, 78-79:

> "The whole contract shows respect for the law and not defiance of it. The parties, who could not foresee how some of the provisions of the statute would be interpreted, proposed to go as far toward union security as they are allowed to go, and this is their right; and they proposed to go no farther, and that is their whole duty."

Nor is there any justification for the majority's "unwilling-[ness] to hold that there is an identifiable group of employees who are not subject to the Texas law." (Pet. App. 21a.) For if the majority view of the choice-of-law problem is accepted, there is no justification for applying Texas law to employees who lack the contacts with that State which are critical on that view. Nor would it be necessary at this time to identify the individual employees as to whom the agency shop would or would not be lawful. This is a declaratory judgment suit: If the Court declares the standard, the parties can be relied upon to apply it, with resort to the District Court in the unlikely event of further controversy.